No. 817

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM A. D. 1943

RAYMOND E. BEEGLE, doing business as BEEGLE TIE SERVICE COMPANY,

Petitioner,

vs.

CHARLES M. THOMSON, as Trustee for CHICAGO & NORTH WESTERN RAILWAY COMPANY, and SHARON STEEL CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REJOINDER BRIEF FOR RESPONDENTS.

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THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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REJOINDER BRIEF FOR RESPONDENTS.

Nothing in the Reply Brief of Petitioner on Questions 1 to 7, reargued as in the Brief in Support of Petition, requires any Rejoinder from the Respondents. Petitioner's arguments on these questions are fully answered in the Brief for Respondents. The so-called "Misstatements" set forth in pages 14 to 18 of Petitioner's Reply Brief, are not misstatements but are correct statements, as shown by the very Record References given by the Petitioner in each instance.

QUESTION 10.

Petitioner failed to argue his Question 10 in his Petition and Main Brief, but now in his Reply Brief and, contrary to the Rules of this Court, argues this Question. We limit this Rejoinder Brief to a discussion of Question 10, which is as follows (Petition, p. 25):

> "Should Findings of Fact prepared by respondent Sharon Steel's counsel and merely approved by the trial judge be accorded the benefits of the third sentences of Rule of Civil Procedure 52(a) in view of the first sentence of Rule 52(a)?"

In the first place, we would point out that there is *nothing* in the Record before this Court in any way justifying the Question. The Record does *not* show that any Findings proposed by Respondent's counsel were approved by the District Court. This is possibly one reason Petitioner's counsel waits to argue the Question in his Reply Brief. We do not deny that both parties submitted Findings of Fact and that the District Court, after due deliberation and in the light of an eleven page brief filed by Petitioner's counsel with respect to Respondents' proposed Findings, and a twelve page brief filed by Respondents' counsel with respect to Petitioner's proposed Findings, adopted as its own, some of Respondents' proposed Findings and some portions of Petitioner's proposed Findings.

Several admissions in Petitioner's Reply Brief itself fully answer Question 10 in the affirmative, as follows:

> "These Findings of Fact * * * were written by respondent's counsel and *approved* as submitted by the trial judge. *They tend to make the case irreversible.*" (P. R. B. p. 2.)*

After admitting that the trial judge *"approved"* the Findings of Fact, and that the *"Court of Appeals * * * honored the Findings of Fact"* (P. R. B. p. 10); it is somewhat presumptuous to say that *"these Findings of Fact do not represent the thinking of the trial judge at all."* (P. R. B. p. 10.)

Petitioner's wishful thinking ignores the fact that "Exhaustive briefs were filed by the parties" (Finding 4, R. 989) and also the even more important fact that the Dis-

*Italics ours.

trict Court in the last paragraph of its Memorandum, directed that—

> "Counsel for the defendants may prepare and file with the Court, in writing, within twenty days from the date hereof, proposed findings of fact, conclusions of law, and a draft of a proposed decree, consistent with the views herein expressed, delivering copies thereof to counsel for the plaintiff. Within ten days of the receipt of such copies counsel for the plaintiff may prepare and file with the Court, in writing, his observations with reference thereto and suggestions for the modification thereof, delivering a copy of such observations and suggestions to counsel for the defendants. Within five days thereafter counsel for the defendants may present to the Court, in writing, his reply to such observations and suggestions. Whereupon, the matter of making findings of fact, conclusions of law and a decree herein will be taken by the Court without further argument." (Brief for Resp. pp. 34, 35; Rec. pp. 986, 987.)

Whereupon, the District Court very promptly made the Findings of Fact and Conclusions of Law (R. 987), and included therein some proposed by Plaintiff and some submitted by Defendants.

U. S. v. *Forness,* 125 Fed. (2d) 928, C. C. A. 2nd, relied upon by Petitioner, is not in point at all here. The facts in that case were contrary to those in the instant case. In the *Forness* case, the Court adopted the winning counsel's proposed "delayed, argumentative, over-detailed" findings. Some of these were "not substantially in accord with the opinion". Apparently, the findings were not entered until a considerable time after the opinion was rendered, so that the evidence was no longer "fresh in the mind of the trial judge". It would seem that the parties were not given an opportunity to file objections to the findings. And the Court did not, as apparently is urged by Petitioner's counsel here, condemn the general practice followed by the Dis-

trict Courts in enlisting the aid of counsel in preparing findings.

Indeed, the Court of Appeals in the portion of its opinion quoted by Respondent's counsel, referred to its previous decision in *Matton Oil Transfer Corporation* v. *The Dynamic, et al.*, 123 Fed. (2d) 999, 1001, in which the Court, after condemning the mechanical signing of "delayed, argumentative, over-detailed" findings, submitted by winning counsel, specifically said:

> "Of course, we do not mean to imply that a trial court is not privileged to seek such aid of counsel, both as to the facts and the law, as it thinks desirable prior to and as a step in decision; or to limit or restrict in any way the procedure for amending or otherwise correcting findings set forth in F. R. C. P. 52(b). Nor do we wish to preclude the trial court from preparing an opinion, for that can be most illuminating and helpful to an appellate court."

We would also point out that the Court of Appeals for the 7th Circuit, in *Process Engineers, Inc.* v. *Container Corporation,* 70 Fed. (2d) 487, condemned the practice followed and the type of findings adopted in the *Forness* case, but that that Court in *Taylor Instrument Company* v. *Fee & Stemwedel,* 129 Fed. (2d) 156, pages 160-161, approved the practice, which was followed by Judge Campbell, in having the parties submit opposed findings and in adopting proper findings, even though proposed by the parties.

Likewise, in *Simons* v. *Davidson Brick Co., et al.,* 106 Fed. (2d) 518, 521, the appellant urged, as does Petitioner here, that the findings of the trial court are entitled to no weight because they were proposed by the appellee, and appellant's counsel cited the *Process Engineers* case to sustain his contention, but the Court of Appeals for the 9th Circuit said:

> "We cannot accede to this contention. The fact that opposing counsel has prepared and submitted find-

> ings of fact for the consideration of the trial judge, and that such findings of fact may have been adopted by the trial judge as his findings, in no way detracts from their legal force or effect. The characterization of the findings of fact adopted by the trial court as 'appellees' findings of fact' is wholly unwarranted."

It is highly significant that Petitioner's Argument on Question 10 wholly ignores the *independent* fact findings of the Appellate Court, which we deal with fully in our main brief and which were not in any sense proposed by Respondent's counsel or "mechanically" adopted by the Court.

We again respectfully urge that the *concurrent* findings of the District *and* Appellate Courts establish that Petitioner is without any standing here and that the Petition is wholly without merit and should be denied.

Respectfully submitted,

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Received ... copies of the foregoing brief this ..... day of ....., 1944.

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